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IN THE

Supreme Court of the United States

OCTOBER TERM, 1924.

No. 322

NORTH CAROLINA RAILROAD COMPANY,
PETITIONER,

vs.

STORY, SHERIFF, AND KING, ADMINISTRATOR,
RESPONDENTS.

BRIEF OF PETITIONER IN OPPOSITION TO MOTION OF RESPONDENTS TO DISMISS THE WRIT OF CERTIORARI.

S. R. PRINCE,
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The motion made by Respondents is based on the claim that the judgment of the Supreme Court of North Carolina sought to be reviewed is not a final judgment. Petitioner states that the record in this case shows that the judgment of the Supreme Court of North Carolina was a final judgment in form and in substance. As set forth in the record, a judgment had been rendered against Petitioner on a cause of action which arose out of the operation of the railroad during Federal control and when the railroad was in the possession

of and being operated by the Government. No execution was issued on this first judgment and a second suit was filed by King, Administrator, against the North Carolina Railroad Company based on the first judgment. There was a judgment in favor of Plaintiff against Petitioner in this second suit. Petitioner appealed to the Supreme Court of North Carolina, which Court affirmed the lower court, and the judgment of affirmance by the Supreme Court was certified to the Superior Court of Guilford County and judgment was there entered in accordance with the certificate of the Supreme Court. The Administrator obtained an execution from the Clerk and delivered it to Story, Sheriff, who, in accordance with the mandate of said execution, levied upon property of the Railroad Company.

This was the situation when Petitioner filed its bill alleging that the execution was illegal and had been issued in contravention of Section 206g of the Act of Congress known as the Transportation Act, which provides:

> "No execution . . . shall be levied upon the property of any carrier where the cause of action on account of which the judgment was obtained grew out of the possession, use, control, or operation of any railroad or system of transportation by the President under Federal control."

The prayer of that bill was for an injunction against the Sheriff's selling the property which he

had theretofore levied upon. Petitioner secured a restraining order (record, p. 15) on the verified bill, and that order directed the Defendants to show cause why an injunction should not be issued restraining them from taking any further steps to satisfy the execution of the judgment and enjoining the Sheriff from selling the property of Plaintiff which he had levied upon. Thereafter the Defendants answered, setting up, among other things, that Section 206g had no application to this controversy and that all the matters alleged in the complaint as grounds for injunctive relief had been adjudicated and were *res adjudicata* (record, p. 13).

With the pleadings in this shape, the case came on to be heard on the motion of Plaintiff to continue and make permanent the temporary restraining order (16), and the Court below entered an order which states:

> "It is now ordered and adjudged that the motion of the Plaintiff to continue and *make permanent* and (the) temporary restraining order issued by Honorable W. F. Harding be and it is hereby denied" (16).

That Court, in the exercise of its discretion, continued the restraining order pending Plaintiff's appeal to the Supreme Court of the State in these words:

> "In the exercise of the discretion vested in the Court by Chapter 58 of the Public Laws

of North Carolina of 1921, and upon motion of the plaintiff, the order of Judge Harding heretofore entered in this case is continued in force and effect pending plaintiff's appeal from the refusal to make said order permanent and the action of the Supreme Court of North Carolina upon said appeal, upon condition that the plaintiff execute a good and sufficient bond in the sum of $3,500, conditioned as is provided by the aforesaid statute.

"The plaintiff is taxed with the costs of the case." (Record, p. 16.)

The record then shows the exception of your Petitioner in the following language:

"To so much of the foregoing order as denies the application of the plaintiff to continue the temporary restraining order *and make the same permanent*, the plaintiff excepts and appeals to the Supreme Court. Notice of appeal is waived and appeal bond is fixed at $100." (Record, p. 16.) (Italics, the writer's.)

The error assigned in the Supreme Court of the State by Petitioner was as follows:

"The refusal of the Court to continue the temporary restraining order, and make the same permanent." (Record, p. 17).

It is upon the foregoing record that we maintain that this was a final judgment. It is our understanding of the law that if the decree which

this Court is called upon to pass on decides finally the right of the parties, that is, if nothing further remains to be done, then the judgment is final.

Petitioner's property had been levied upon and unless restrained it would be sold and, therefore, in the nature of things, the injunction asked in this case was not merely ancillary but was the principal and the only relief demanded. It was the relief itself.

It will be noted that in the judgment of the Superior Court the Plaintiff is taxed with the costs of the case. This is never done unless the judgment is final.

There remains nothing to be done in this case and the statements in the brief of Respondents that the case is still pending and the issues have never been tried are mere words.

The statement is made in the brief (p. 3) that the motion made was "for a temporary or preliminary injunction to restrain action by Respondents under said execution *until the case could be heard upon the merits* and finally determined." This is an error. As will have been seen, the motion made was to make permanent the restraining order theretofore secured.

Petitioner could have asked that the restraining order be continued until the hearing, but it realized that the whole case was made by the bill and answer and that there was in issue but one single point of law arising under the Transportation Act and, therefore, it did not ask for a continuance of the restraining order until the hear-

ing, but it asked that the restraining order be made permanent and this is what was denied, and the judgment of the Court below which was affirmed was a denial of a permanent injunction.

In the report of the case, the reporter, in stating what was before the Court, said:

> "From so much of the judgment as refuses to continue the restraining order to the hearing and also to make the same permanent, Plaintiff excepts and appeals."

That is inaccurate because, as heretofore shown, the record, pages 16 and 17, shows that Petitioner excepted to the refusal of the Court "to continue the temporary restraining order and make the same permanent." This same language was used in the assignment of error, and at no time did Petitioner ask for a continuance of the restraining order to the hearing. There was nothing to be heard except the issue of law which had been determined by the lower court and which determination was affirmed by the Supreme Court.

The cases cited by the Respondents are easily and clearly distinguishable from the case in hand. In those cases there remained something to be done or there was merely a demurrer sustained with the right to amend remaining. In this case there remained nothing to be done and if the Petitioner does not secure relief its property will be sold contrary, as we believe, to the Federal statute.

We are aware that this Court has held that it

will not review by piecemeal the action of a State Court. We are not asking that.

We are also aware that in certain cases this Court has ruled that on the question of finality the form of the judgment is controlling. If that be the rule, then we assert that the form here is a final judgment.

The Court is referred to the case of *Carondelet Canal Company* vs. *Louisiana*, 233 U. S. 362. That was a suit by the State of Louisiana in a Louisiana Court against the Canal Company for the recovery of a canal and certain appurtenant properties. The suit was dismissed by the Civil District Court. On appeal the Supreme Court of the State reversed the judgment dismissing the suit and ordered that a judgment be entered against the Canal Company, but reserved for further adjudication in the proceedings the claims of the State to a certain strip of ground, and ordered an accounting. The case was thereupon brought to this Court and in this Court a motion to dismiss on the ground that the judgment was not final was made. This Court said:

> "The judgment disposes of and orders the delivery of practically all of the property sued for: (1) the waterway in its entirety; (2) all the property and improvements appurtenant to it, including the roadway or roadways upon the sides of it. It reserves property not appurtenant and an accounting of certain disbursements. The reservation concerns only a small

piece of ground upon which there was a dispute as to whether it was appurtenant to the canal, a question the court apparently could not determine as it was a question of fact. All else will be taken from the canal company and delivered to the State. That is, all was decreed that it was the purpose of the suit to have decreed and which not only constituted its success, but which involved and disposed of the Federal right asserted by the canal company. The judgment, therefore, has a substantial finality. Is it not as well in form?"

The Court further referred to certain cases, some of which have been cited by Petitioner in this case, and differentiated them in the following language:

"In the case at bar there is distinct and explicit finality and the further proceedings are directed to apply only to the 'questions reserved.' And, it is to be assumed, this was purposely done to give finality to the questions not reserved, so that the decree could be immediately executed upon the property involved requiring it to be delivered into the possession and administration of the State. This disposition we can easily conceive, the Court considered necessary to the rights which the State was adjudged to have and the remedy commensurate with them. The decree, therefore, had a definiteness which did not exist in the cited cases, the Federal rights asserted by the canal company were injuriously disposed of. The ground of dismissal of the writ of error based on the judgment is not, therefore, sustained."

The case at bar has an explicit finality and the Federal right asserted in the lower court and ruled against this Petitioner in the lower court was finally decided adverse to this Petitioner, which decision was affirmed by the Supreme Court of the State. That the affirmance closed the chapter so far as the State Court was concerned on the Federal right here asserted, the opinion of the Supreme Court is, we think, conclusive. It said:

> "As we understand there is no substantial difference between the parties as to the facts affecting their rights, and from these facts contained in the present record, and by proper reference in the case of *King, Admr.* vs. *R. R.*, reported in 184 N. C., p. 442, it appears . . " (p. 1, opinion of Supreme Court of North Carolina).

This shows that there was no dispute of fact and that the only question in issue was one of law arising on the pleadings.

The Supreme Court, after referring to the preceding cases between the same parties growing out of the same cause of action, said:

> "Upon these the facts chiefly pertinent, we must approve His Honor's ruling in denial of the injunction, and are of opinion that the plaintiff is concluded by the judgments against it as to the protection and immunity it now

endeavors to invoke." (P. 4, Supreme Court of North Carolina's opinion)

The Court further said:

> "From the force and effect of these two judgments, unchallenged and unquestioned by writ of error or other process looking to their modification, we are of opinion as stated that plaintiff is concluded on the question of liability and that its application for an injunction against final process has been properly refused." (P. 6, opinion of Supreme Court of North Carolina)

No language could make it plainer that there remains nothing further to be done and that this judgment from which this writ is sued out is final not only in form but in substance.

This Court held as late as *Bruce* vs. *Tobin*, 245 U. S., 18, "that the finality contemplated was to be determined by the facts of the record and the formal character of the judgment rendered . . " This means, as we view it, that since this judgment did not say that the case was dismissed, which would have been a work of supererogation, particularly as it taxes the costs against the Plaintiff, which can be done only by a final judgment, this Court can look to the judgment *and* the record in determining whether or not it is in truth and in form a final judgment. If this Court will examine the record we feel confident it will reach the

conclusion that the judgment is final in this case in form and in substance.

Respectfully submitted,

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